

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

July 9, 2003

IN RE:

GENERIC DOCKET TO CONSIDER
TECHNOLOGY ADVANCES

)
)
)
)

DOCKET NO.
02-00434

ORDER CLOSING DOCKET

This matter came before Chairman Sara Kyle, Director Deborah Taylor Tate and Director Pat Miller of the Tennessee Regulatory Authority (the "Authority"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on April 24, 2003, for consideration of the *Report and Recommendation* (the "Report") of the Pre-Hearing Officer which was filed on April 1, 2003.

Background

The Authority previously addressed the issue of technology advances in Docket No. 97-01262, *In Re: Petition of BellSouth Telecommunications, Inc. to Convene a Contested Case to Establish "Permanent Prices" for Interconnection and Unbundled Network Elements* (the "Permanent Prices Docket"). The purpose of the Permanent Prices Docket was to "establish cost-based prices for interconnection and unbundled network elements (UNEs)" as required by the Telecommunications Act of 1996.¹ In the Permanent Prices Docket the Authority issued a series of orders containing directives regarding the issue of technology advances.

¹ *In re: Petition of BellSouth Telecommunications, Inc. to Convene a Contested Case to Establish "Permanent Prices" for Interconnection and Unbundled Network Elements* (hereinafter the "Permanent Prices Docket"), Docket No. 97-01262, *Final Order*, pp. 1-2 (February 23, 2001).

In its *Interim Order on Phase I of Proceeding to Establish Prices for Interconnection and Unbundled Network Elements* issued January 25, 1999, the Authority stated:

Due to technological advances, the direct and indirect costs of maintaining the telephone network have declined over the past ten (10) years and are expected to do so in the future. BST [BellSouth Telecommunications, Inc.] has been able to reduce its workforce, at least in part, as a result of increased automation in network maintenance. For example, a BST employee can test for trouble on a subscriber's loop without ever having to leave his or her office. All of the parties agree that this type of productivity should be reflected in the forward-looking costs of UNEs. Therefore the Authority must determine a reasonable level of productivity to include in the calculation of UNEs.²

The Authority revisited the issue of technological advances in the Permanent Prices Docket in its *Second Interim Order Re: Revised Cost Studies and Geographic Deaveraging* issued on November 22, 2000, and stated:

The Authority's directive in its January 25, 1999 First Interim Order that "prices should be established using the forward-looking economic cost methodology as defined by the FCC's TELRIC methodology," places a fiduciary responsibility on all parties, CLEC and ILEC alike, to ensure that the methodology adopted is populated only with those costs that reflect the least cost and most efficient technology. To the extent that BellSouth presents new technology in other venues, it has, as articulated in the First Interim Order, a responsibility to include that technology in cost studies filed in Tennessee. The Authority's Phase I decisions in this proceeding would lack the desired effect were BellSouth not required to do so.³

The *Third Interim Order re: BellSouth's Revised Cost Studies*, issued on January 4, 2001, reflected the Authority's directive to BellSouth to make adjustments to its TELRIC Calculator Model "to include any new, least cost and most efficient technology available to BellSouth and reflected in its cost studies in other states."⁴ The Authority also stated, with regard to "[t]echnological advances reflected in BellSouth's cost studies in other states" that BellSouth

² Permanent Prices Docket, *Interim Order on Phase I of Proceeding to Establish Prices for Interconnection and Unbundled Network Elements*, p. 15 (January 25, 1999).

³ Permanent Prices Docket, *Second Interim Order Re: Revised Costs Studies and Geographic Deaveraging*, pp. 9-10 (November 22, 2000).

⁴ Permanent Prices Docket, *Third Interim Order re: Revised Cost Studies and Geographic Deaveraging*, p. 2 (January 4, 2001).

had failed to include technological advances contained in the BellSouth cost studies filed in Georgia and thereby had defeated the purpose of using a forward-looking cost methodology like TELRIC to set UNE rates. Thereafter the Authority ordered BellSouth to include in Tennessee cost studies any new technology that was included in similar cost studies filed in other states.⁵

The *Final Order* in the Permanent Prices Docket was issued on February 23, 2001, wherein the Authority stated:

The Authority finds that as telecommunications technology improves, the direct and indirect costs of maintaining the telephone network may continue to decline over time. At the same time, ILECs and CLECs should continue to adjust their operations in a manner consistent with advances in technology, leading to less and less manual-related costs and more automation-related costs. Over time, telecommunications network expenses should decrease . . . Nevertheless, because the Authority finds that the process of incorporating technology advances may be cumbersome and delay establishing permanent prices for unbundled network elements, the Authority determines to convene a new generic proceeding to consider technology advances and geographic deaveraging.⁶

Consistent with its *Final Order* in the Permanent Prices Docket, the Authority opened Docket No. 01-00339, *In re: Generic Docket to Consider Technology Advances and Geographic Deaveraging* and at the May 1, 2001 Authority Conference voted unanimously to appoint a Pre-Hearing Officer for the purpose of determining the scope of Docket No. 01-00339. In the course of determining the scope of Docket No. 01-00339, the Pre-Hearing Officer issued a *Report and Recommendation* finding that resolving technology advances issues and geographic deaveraging issues in a single docket could be difficult and could create confusion.⁷ The Pre-Hearing Officer for Docket No. 01-00339 recommended opening a separate docket for considering technology advances. At the April 16, 2002 Authority Conference, the Directors voted unanimously to

⁵ See Permanent Prices Docket, *Third Interim Order re: Revised Cost Studies and Geographic Deaveraging*, pp. 6-7 (January 4, 2001).

⁶ Permanent Prices Docket, *Final Order*, pp. 9-11 (February 23, 2001).

⁷ *In Re: Generic Docket to Consider Technology Advances and Geographic Deaveraging*, Docket No. 01-00339, *Report and Recommendation*, p.1 (March 13, 2002).

accept the recommendation of the Pre-Hearing Officer for Docket No. 01-00339, convene this Docket, and appoint a Pre-Hearing Officer to determine the scope of this docket.

On April 26, 2002, the Pre-Hearing Officer for this docket (the Pre-Hearing Officer) issued a *Notice of Filing* seeking comments on the scope of this docket from interested persons and entities. The *Notice of Filing* provided an opportunity for those who wished to comment to provide a list of UNE rates they deemed appropriate for review as a result of technology advances, a list of UNEs for which they considered an initial rate necessary as a result of technology advances and a description of the technology advance affecting the UNE.⁸

On May 24, 2002, a group of CLECs (the "Consolidated CLECs")⁹ filed the *Consolidated CLEC Comments* arguing that "the time has come to reconsider in their entirety the recurring and nonrecurring rates for UNE loops and switching for BellSouth in Tennessee" and concluding that technological advances in loop, switching, and cost modeling justify reconsideration of all recurring and nonrecurring rates for all UNEs listed in an attachment to the *Consolidated CLEC Comments*.¹⁰ The attached list included elements other than those related to loops and switching.¹¹

Also on May 24, 2002, United Telephone-Southeast, Inc. and Sprint Communications Company L.P. ("Sprint") and BellSouth Telecommunications, Inc. ("BellSouth") each filed comments in response to the Pre-Hearing Officer's Notice of April 26, 2002. In its comments,

⁸ *Notice of Filing*, (April 26, 2002).

⁹ This group consisted of The Association of Communications Enterprises; AT&T Communications of the South Central States, LLC and TCG MidSouth, Inc.; Cinergy Communications Company; DIECA Communications, Inc. d/b/a Covad Communications Company; ITC^DeltaCom Communications, Inc.; MCI WorldCom Communications, Inc.; MCImetro Access Transmission Services, LLC; Brooks Fiber Communications of Tennessee, Inc.; Network Telephone Corporation; NewSouth Communications Corp.; and Birch Telecom, Inc. The Pre-Hearing Officer granted the intervention of BellSouth Telecommunications, Inc. by an Order dated May 24, 2002. The Pre-Hearing Officer granted the interventions of Sprint Communications Company, L.P. and United Telephone-Southeast, Inc.; MCI Worldcom Communications, Inc.; Cinergy Communications Company; Birch Telecom, Inc.; DIECA Communications, Inc. d/b/a Covad Communications Company; and AT&T Communications of the South Central States by an Order dated June 7, 2002.

¹⁰ *Consolidated CLEC Comments*, pp. 3, 6 (May 24, 2002).

¹¹ See *Consolidated CLEC Comments*, Attachment (May 24, 2002).

Sprint requested that “the TRA include in the scope of this proceeding further consideration of how competitive LECs might offer advanced services where fiber optic cable is present in the local loop.”¹² BellSouth commented that no UNE rates from the Permanent Prices Docket require review as a result of technology advances.¹³ BellSouth submitted further that “there are no UNEs for which an initial rate is needed as a result of technology advances.”¹⁴

After reviewing the comments of the parties, the Pre-Hearing Officer issued an Order on June 13, 2002, finding that additional argument was needed to develop a comprehensive list of UNE rates to be fixed in this docket. The Pre-Hearing Officer noted that the arguments presented by the Consolidated CLECs focused on advances impacting loops and switching while the attached list of UNEs presented by the Consolidated CLECs included elements other than loops and switching. Based on this discrepancy, the Pre-Hearing Officer directed the Consolidated CLECs to supplement their comments.¹⁵

On June 28, 2002, the Consolidated CLECs filed a *Motion for Reconsideration* of the Pre-Hearing Officer’s June 13, 2002 Order arguing that it required them to “prove their entire case before the Authority establishes the scope of the proceeding and determines what will be accomplished in the docket.”¹⁶ On July 12, 2002, BellSouth responded to the *Motion for Reconsideration*, requesting that it be denied.

On July 15, 2002, the Pre-Hearing Officer issued an order denying the Consolidated CLECs’ *Motion for Reconsideration* finding that the June 13, 2002 Order reasonably requested additional information in furtherance of determining the scope of this docket.¹⁷ In the Order, the Pre-Hearing Officer correctly noted that the purpose of this docket is to identify UNEs impacted

¹² *Comments of United Telephone-Southeast, Inc. and Sprint Communications Company L.P.*, (May 24, 2002).

¹³ *Comments of BellSouth Telecommunications, Inc.*, (May 24, 2002).

¹⁴ *Comments of BellSouth Telecommunications, Inc.*, (May 24, 2002).

¹⁵ *Order*, pp. 3-4 (June 13, 2002).

¹⁶ *Motion for Reconsideration*, p. 3 (June 28, 2002).

¹⁷ *Order Denying Motion for Reconsideration*, p. 4 (July 15, 2002).

by advances in technology and that it was not the purpose of this docket to evaluate the rates of all UNEs.¹⁸

Ultimately, DIECA Communications, Inc. d/b/a Covad Communications Company (“Covad”) is the only party to file a response supplementing their previous comments pursuant to the Pre-Hearing Officer’s June 13, 2002 Order. Covad filed supplemental comments on August 30, 2002 suggesting that the Authority should “set initial rates for a new UNE that would allow CLECs to provision xDSL services through Tennessee Remote Terminals (“RTs”) that BellSouth has equipped with various advanced technologies.”¹⁹ Covad described this new UNE as an “end-to-end Broadband UNE.”²⁰

BellSouth filed supplemental comments on September 30, 2002 noting that the Consolidated CLECs had not filed any comments to supplement their original filing and arguing that, to date, the Consolidated CLECs had failed to identify any technology advance which had impacted any existing UNE.²¹ BellSouth also responded to Covad’s suggestion of incorporating consideration of an “end-to-end Broadband UNE” in this docket. BellSouth argued that, to do so, the Authority would first have to establish Digital Subscriber Line Access Multiplexers (“DSLAMS”) in BellSouth’s remote terminals as UNEs and that Covad could not make the “impairment” showing required by the federal Telecommunications Act of 1996 to enable the Authority to do so.²²

The voting panel considered the *Report* at a regularly-scheduled Authority Conference held on April 24, 2003. After consideration of the *Report*, a motion consistent with the Pre-

¹⁸ See *Order Denying Motion for Reconsideration*, p. 4 (July 15, 2002).

¹⁹ *Covad’s Supplemental Comments*, p. 1 (August 30, 2002).

²⁰ *Covad’s Supplemental Comments*, p. 7 (August 30, 2002).

²¹ *Responsive Comments of BellSouth Telecommunications, Inc.*, pp. 4-5 (September 30, 2002).

²² *Responsive Comments of BellSouth Telecommunications, Inc.*, p. 1 (September 30, 2002).

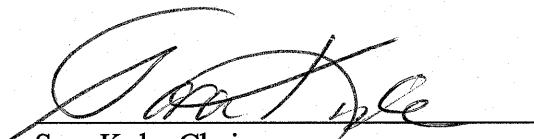
Hearing Officer's recommendation that the Authority close this Docket was made and the panel voted unanimously to do so.


Analysis


The Pre-Hearing Officer's solicitation of comments from the parties identifying specific "technological advances" that directly affect or impact existing UNE rates has not elicited anything that would assist the Authority in identifying such advances.²³ The Pre-Hearing Officer reiterated this point at the April 24, 2003 Authority Conference stating that "it had proved difficult in this Docket to elicit a useful list of UNEs that were to be dealt with and, therefore, my report and recommendation was that this docket be closed." The Pre-Hearing Officer's observation in the *Report* that "changes in UNE prices to account for technology advances would inevitably be piecemeal, whereas the Authority established UNE prices on a comprehensive bases in the Permanent Prices docket . . ." creates the possibility that the "product of this Docket may be incompatible with the product of the Permanent Prices Docket" is well taken.

IT IS THEREFORE ORDERED THAT:

For the reasons set forth in this Order, this Docket is closed.


Sara Kyle, Chairman


Deborah Taylor Tate, Director


Pat Miller, Director

²³ See *Report and Recommendation*, p. 12 (April 1, 2003).